

CASE

OF

ANTHONY

EARL

OF

SHAFTSBURY

As it was Argued before His Majesties Justices of the
Kings Bench, Trin. Term. 29. Car. 2.

Being upon his CONFINEMENT in the TOWER &c.

With a SPEECH of this Worthy EARL, pleading his own Case, and the Liberty of the Subject.

LONDON,

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CASA

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To the READER.

T HIS being the CASE of a PEER of this Realm,
wherein the Liberty of the Subject is concerned; and
being Argued before His Majesties Justices of the
K. B. It is Published for thy Satisfaction.

It was argued before the Majesties of the
Your Honor, Your Honor, &c.

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Trin. 29. Car. 2. B. R. Jun. 27. & 29.

1677

T H E
EARL of SHAFTSBURY'S
C A S E.



HIS day the Earl of Shaftsbury was brought to the Bar upon the return of an *alias Hab. Corp.* directed to the Constable of the Tower of London; the effect of the return was, that *Anthony Earl of Shaftsbury*, in the Writ mentioned, was Committed to the Tower of London. 16. Febr. Anno Dom. 1676, By vertue of an Order from the Lords Spiritual and Temporal then in Parliament assembled: the Tenour of which Order followeth in *hac verba*:

Ordered by the Lords Spiritual and Temporal in Parliament Assembled, That the Constable of His Majesties Tower of London, his Deputy, or Deputies, shall receive the Bodys of James Earl of Salisbury, Anthony Earl of Shaftsbury, and Philip Lord Wharton; Members of this House, and keep them in safe Custody, within the said Tower, during His Majesties Pleasure, and the Pleasure of this House; for their High Contempts committed against this House, and this shall be a sufficient Warrant on that Behalf.

To the Constable of the Tower, &c.

J. Browne Cler. Par.

The Earl of Shaftsbury's Council prayed that the return might be Filled, and it was so, and Friday following appointed for debating the sufficiency of the return, and in the meantime directions were given to his Council to attend the Judges and Attorney General, with their exceptions to the return, and my Lord was remanded till that day, and it was said

said that though the return was filed, the Court could remand or Commit him to the *Marshalsea* at their Election.

On Friday the Earl was brought into Court again, and his Council argued the insufficiency of the return.

Williams said, That the Cause was of great consequence, in regard that the King was touched in his Prerogative ; the Subject was touched in his Liberty, and this Court in its Jurisdiction.

1st. The Cause of Commitment which is returned, is not sufficient for the general Allegations of high Contempts is too uncertain, for the Court cannot judge of the Contempt, if it doth not appear in what act it consists.

2^{dly}. It is not known where the Contempts were committed, and in favour of liberty, it shall be intended they were committed out of the House of Peers.

3^{dly}. The time is uncertain, so that, peradventure, it was before the last Act of General Pardon.

4^{thly}. It does not appear whether the Commitment were on a conviction or accusation only.

It cannot be denied, but that the return of such a Commitment, by any other Court, would be too general and uncertain, *More. 893, Aft-wish* was Bailed on a return, *quod commissus fuit per mandatum. N. Milit. Dni. Custod. Magn. Sigil Anglie virtute cujusdem contemptus in curia facti*, and in that Book, that divers other persons were bailed on such general returns, and the Cases have been lately affirmed in *Bushels Case*, reported by the late Lord Chief Justice *Vaughan*, where it is expressly said that such Commitment and return being too general and uncertain, the Court can't believe in an implicate manner, that in truth the Commitment, was for causes particular and sufficient.

Vaughan's Reports, 140. Accord. 2. Inst. 52, 53. & 55. and the 1. Rolls. 218. and though the Commitment of the Jurors was for acquitting *Pen and Mead, contra plenam & manifestam evidentiam* : it was resolved to be too general, for the evidence ought to appear as certainly to the Judge of the return, as it appears before the Judge authorised to Commit. *Rush. Case.*

137.
Now this Commitment being by the House of Peers will make no difference ; for in all Cases where a matter comes in Judgment, before this Court, let the question be of what nature it will, the Court is obliged to declare the Law, and that without distinction, whether the question began in Parliament or no. In the Case of *Geo. Binion in C. B.* there was a long Debate, *Whether an Original Writ might be Filed against a Member of Parliament, during the time of Priviledge* ; and it was urged, that it being during the Session of Parliament, the termination of the Question did belong to the Parli-

ment ;

ment, but it was resolved that an Original might be filed, and *Bridgman* then Chief Justice, said that the Court was obliged to declare the Law in all Cases that came in Judgment before them. *H. 4. Ed. 4. Rut. 4. 7. 10.* in *Scacc.* In Debt by *River* Versus *Cousin*, the Defendant Pleads that he was sent of a Member of Parliament, & *Ideo Capi seu arrestant non debet*, and the Plaintiff prays Judgment, and afterwards by Advice of all the Judges the Judgment was entred. *Videtur Baronibus quod tale habetur Privilegium quod Magnates, &c. Et eorum familiares capi seu arrestare non debent sed nullum habetur privilegium quod non debent Implantare ideo respondet Noster.* So in *Triniards* Case, a question of Priviledges was determined in this Court. *Dyer. 60. in 14. Ed. 3.* in the Case of *Sr. John*, and *Sir Jeoffry Stanton* which was cited in the Case of the Earl of *Clarendon*, and is entred in the Lords Journal.

An Accord of wast, depended between them in the Common-Pleafe, and the Court was divided and the Record was Certified into the House of Lords, and they gave direction that the Judgment should be Entred, for the Plaintiff afterwards on a Writ of Error, brought in this Court that Judgment was Reversed: Notwithstanding the Objection, that it was given by order of the House of Lords; for the Court was Obligated to proceed according to the Law in a matter that was before them in point of Judgment. Not long since the Earl of *Bristol* Exhibited an Accusation against the Earl of *Clarendon* to the House of Lords, and it contained divers matters whereof some did arise out of Parliament, and it was referred to the Judges to consider whether that procedure was Parliamentary, and the 4th. July 1663. it was resolved by the Judges that the Lords ought not to proceed only upon an Impeachment by the Commons, when the matters arise out of the House.

The Construction of all Acts of Parliament, are given to the Courts of *Westminster*, and accordingly they have Judges of Validity of Acts of Parliament, they have searched the Rolls of Parliament, *Hub. 109.* Lord *Hunsdons* Case, they have determined whether the Journal be a Record: *Hub. 110:* When a point comes before them in Judgment, they are not fore closed by any Act of the Lords, but ought to Judge according to the Law, by which the Realm is Governed and not by the Lords: if it appears that an Act of Parliament be made by the King and the Lords without the Commons, that Act is *Felo-de-se*, and the Courts of *Westminster* ought to judge it void, *4. H. 7. 18. Hub. 111.* and accordingly they ought to do, if this return contain in it that which is fatal to it self, it hath been a question often resolved in this Court when a Writ of Error in Parliament, shall be a supersedias, and this Court hath determined that shall be said to be a Session of Parliament, *1. Rolls. 29.* and if the Law were otherwise there would be a failure of Justice if the Parliament were Desolved, there would be no question but the Prisoner should be discharged on a *Habeas Corpus*, and yet then the Court must ex-

amine the cause of Commitment, and by Consequence a matter Parliamentary, and the Court may now have Cognissance of the matter, as clearly as when the Parliament is Defolved, the Party would be without remedy for his Liberty, if he could not find it here, for it is not sufficient for him to procure the Lords to determine their pleasure for his Imprisonment, for before his Enlargement he must have the Pleasures of the King to be determined, and that ought to be in this Court, and therefore the Prisoner ought first to resort hither.

Let us suppose (for it does not appear in the return, and the Court ought not to Enquire of any matter out of it,) that the supposed Contempt was a thing done out of the House; it would be hard for this Court to remand him: Suppose he were removed to a Foreign Prison, during the Pleasure of the Lords: No doubt, but that would have been an Illegal Commitment against *Magna Charta* and the Petition; there the Commitment would have been Expressly Illegal, and it may be this Commitment may be no less; for if it had been Expressly shewn, and if he be remanded, he is Committed by this Court who are to answer for his Imprisonment.

But 2; the limitation of the Imprisonment during the Pleasures of the King and the House is Illegal and uncertain; for since it ought to determine in two Courts, it can have no certain Period, a Commitment until he shall be Discharged by Kings Bench and Common Pleas is Illegal; for the Prisoner can't apply himself in such a manner as to obtain his Discharge. If a Man be Committed to further order Cook saith, he is Baylable presently, for that Imports till he shall be delivered in good course of Law, and if this Commitment have not that Sence, it is Illegal, for the pleasure of the King is that which shall be determined according to Law in his Courts, as where the Stat. of *Westminster*, 1 Chap. 15. declares that he is not reprovab, who is taken by Command of the King, who ought not to extend to an Extra judicial Command but in his Courts of Justice, to which all matters of Judicature are deligated and distributed. 2 *Inst.* 186. and 187.

Wolton, To the same purpose, cited *Busshels case*, *Vaughan*, 137. that the return for high Contempts was not sufficient, and the Court that made the Commitment in this Case makes no difference, in the Case for otherwise one may be Imprisoned by the House of Peers Unjustly, for a matter releivable here and yet shall be without any manner of relief, by such a return, for on Supposition that this Court ought not to meddle where the person is Committed by the Peers, any person at any time and for any Cause may be subject to a perpetual Imprisonment at the Pleasure of the Lords.

And the Law is otherwise for the House of Lords is the Supream Court yet their Jurisdiction is limited by the Common and Statute-Law, and

and their Excises are examinable in this Court, for there is a great difference between the Errors and Excise in and of a Court between an Erroneous proceeding without Jurisdiction, which is void and a meer Nullity 4. *H. 7.* 18. 6. in the Parliament the King would have one attain it of Treason, and lose his Lands, and the Lords assented but nothing was said of the Commons, wherefore all the Justices held clearly that it was no Act, and he was restored to his Land, and without doubt in the same case if the Party had been Imprisoned, the Justices might have made the like resolution that he ought to have been discharged.

It is a solecisme that a Man shall be Imprisoned by a limited Jurisdiction, and it shall not be examinable, whether the cause were within their Jurisdiction or not, if the Lords without the Commons should grant a Tax, and one that refused to pay it should be Imprisoned, the Tax is void, but by a general Commitment the Party shall be remedys if so be the Lords should award a *Capias* for Treason or Felony.

By these Instances it appears that their Jurisdiction was restrained by the Common Law, and it is also restrained by divers Acts of Parliament, 1. *Hen. 4. Chap. 14.* no Appeals shall be made, or any ways pursued or where a Statute is made a Power is Implicitly given to this Court by the Fundamental Institution, which makes the Judges Expositors of Acts of Parliament; and peradventure if all this case appeared upon the return this might be a Case in which they were restrained by the Stat. 4. *Hen. 8. Chap. 8.* That all the Suits, Usements, and Condemnations, &c. Many time from henceforth, at any time to be put or had upon any Members for any Bill speaking or reasoning of any matters concerning the Parliament to be Communed or Treated of, shall be utterly void and of no Effect, now it does not appear, but this is a Correction and Punishment Imposed upon the Earl, contrary to the Statute, there is no question now made of the Power of the Lords, but it is only urged that it is necessary for them to declare by Vertue what Power they proceed otherwise the Liberty of every *English* Man shall be subject to the Lords, whereof they may deprive any of them against an Act of Parliament, but no usage can justify such a proceeding. *Elsmores* Case of the Post, *Nati.* 19. The Duke of *Suffolk* was Impeached by the Commons of High Treason, and Misdemeanors, the Lords were in doubt whether they should proceed upon such a general Impeachment to Imprison the Duke; and the advise of the Judges being demanded, and their Resolution given in the Negative the Lords were satisfied. This Case is mentioned with design to shew the respect given to the Judges, and that the Judges have determined the highest matters in Parliament. At a Conference held between the Lords and the Commons, 3d. *April.* 4. *Car.* concerning the right and Privilege of the Subject, it was declared and agreed, that no Freeman ought to be Committed or restrained by Commitment of the King or Privy Council, or any other (in which the House of Peers is included,)

included,) unless some cause of Commitment, Restraint, or Detainer, be set forth for which by Law he ought to be Committed, &c.

Now if the King who is the head of the Parliament, nor the Privy Council who is a Court of State, to which secrecy is so necessary may not Imprison without shewing cause *a fortiori*: The Lords in Parliament can't, which are a Court of Law as well as a Court of State, and therefore ought not to proceed in an Illegal manner, tis true in 1. *Rolls*. 192. *Rushworths Case*, Cook is of Opinion that the Privy Council may Commit without shewing cause, but in his more Mature Age, he was of another Opinion and accordingly the Law is declared in the Petition of Right.

Smith argued to the same purpose, and said a Judge cannot make a Judgment unless the Fact appears to him and on an *Habeas Corpus*, the Judge can only take notice of the Fact returned, it is lawful for any Subjects that finds himself agrieved by any Sentence or Judgment to Petition the King in an humble manner for redress and where the Subject is restrained of his liberty the proper place for him to apply himself unto is this Court which hath the Supream Power as to this purpose, over all Courts and on an *Habeas Corpus* I shewing hence, the King ought to have an Account of his Subject *Rolls. Hab. Corp.* 64. *Witherlies Case*, and though the Commitment be by the Lords, yet if it be Illegal, this Court is Obligated to discharge the Prisoner, as well as if he had been Illegally Imprisoned by any other Court; the House of Peers is a high Court but the *Kings Bench* hath ever been Instructed with the Liberty of the Subject, and if it were otherwise in case of Imprisonment by the Peers, the Power of the King was less absolute than the Power of the Lords.

It does not appear but that this Commitment was for Breach of the Priviledge, but nevertheless if it were, this Court might give relief as appears in *Sr. George Bigmores Case* before cited and *Mch.* 12. *Ed.* 4. *Rut.* 20. for the Court which has Power to judge what is Priviledge has also Power to judge what is Contempt of Priviledge if the Judges may judge of an Act of Parliament, *A fortiori*, they may judge of an order of the Lords, 20. *Ed.* *Butchers case*, where he in Reversion brought an Action of Wast, and dyed before Judgment, and his Heir brought an Action for the same Wast, and the King and the Lords determined that it did lie, and commanded the Judges to give Judgment accordingly for the time to come, but by *Ryley.* 39. it appears that it is only an Order of the King and the Lords, and that was the cause the Judges conceived that they were not bound by it, but 39. 3. 13. and ever since have Judged the contrary if it be admitted. for that for Breach of Priviledge may Commit, yet it ought to appear on the Commitment that that was the Cause, for otherwise that may be called a Breach, which is only a refusal to answer to a matter whereof the House of Lords is restrained to hold Plea by

the Stat. of the 1st. of *Hen. 4.* and for a Contempt Committed out of the House they cannot Commit, for the Word Appeal in the Statute extends to all Misdemeanors, as it was resolved by the Judges in the Earl of *Clarendon's* Case, *July. 1663.* If the Imprisonment be not lawful the Court cannot remand him to his wrongful Imprisonment, for that would be an Act of Injustice, to Imprison him, *De nono Vaughan. 156.* It does not appear whether the Contempt was a Voluntary Act, or an Opinion, or an Inadvertency, and he has now suffered five Months Imprisonment already, false Imprisonment is not only where the Commitment is unjust, but where the Petition is too long. 2 *Inst. 53.* In this Case if this Court cannot give Remedy, peradventure the Imprisonment shall be perpetual for the King as the Law is now taken may Adjourn the Parliament for 10 or 20 Years.

But all this is said on Supposition that this Session has Continuance, I conceive that the Kings giving his Royal Assent to several Laws which has been Enacted, the Session is determined, and then their order for the Imprisonment is also determined *Brook Parliament. 86.* Every Session in which the King Signs Bills is a day of it self, a Session of it self, 1. *Car. 1. 71.* A Special Act is made, the giving the Royal Assent to several Bills, shall not determine the Session. ('Tis true, tis there said to be made for the avoiding all Doubts.) In the Stat. 16. *Car. 1.* There is a Promise to the same purpose, and also 12. *Car. 2. 1.* and 22. and 23. *Car. 2. 2. 1. 11. Ro. 2. No. 12.*

By the Opinion of *Cook. 4. Inst. 27.* the Royal Assent does not determine, but the Authorities on which he relies, don't Warrant his Opinion; for first in the Parliament, *Roll. 1. H. 7.* It appears that the Royal Assent was given to the Act, for the reversal of the Attainder of the Members of Parliament; the same day it was given to the other Bills, and the same Year the same Parliament Assembled again, and then tis Probable, that the Members which had been attained were present and not before, 8 *R. 2. No. 13.* is only a Judgment in Case of Treason, by Vertue of a Power reserved to them on the Statute 25. *Ed. 3. Rot. Parliament. 7. H. 4. No. 29.* is not an Act of Parliament, 14. *Ed. 3. N. 789.* The Act is first entred on the Roll, but on Condition the King will grant their other Petitions, the Inference my Lord *Cook* makes, that the Act for the Attainder of *Queen Katherine, 33. H. 8.* was passed before the determination of the Session, yet it was on a Judgment given against by the Commissions of Oyer and Terminer, and the Subsequent Act is only an Act of Confirmation; but *Cook* ought to be Excused for all his Notes and Papers were taken from him, so that this Book did not recieve his last hand, but is observable he was one of the Members of the Parliament, 1. *Car. 1.* When the Special Act before mentioned, and was made, and no Instance can be given where an Act was passed; and afterwards the Parliament did proceed in that Session only where there was a Precedent Agreement between the King and the Houses, so I conclude that the order is Determined

mined with the Session, and the Earl of Shaftsbury ought to be Discharged. *Writ* to the same effect argued; That the Warrant is not sufficient, for it does not appear that it was made by the Jurisdiction is desired in the House of Peers; for that is *coram Rege in Parlamento*, so that the King and the Commons are present in supposition of Law, and the Writ of Error in Parliament is *Inspeculo Recordo nos consilio & advisamento Spiritualium & Temporalium, & Communitatum in Parlamento predict' existent'*, &c. it would not be difficult to prove that anciently the Commons did assist there, and now it shall be intended that they were present; for there can be no Averment against the Record. The Lords do several Acts as a distinct House, as the Debating Bills, the Enquiring of Breaches of Privileges, and the Warrant in this Case being by the Lords Spiritual and Temporal, cannot be intended otherwise, but that it was done by them in their distinct capacity, and then the commitment being during the Pleasure of the King and the House of Peers, it is manifest that the King is Principal, and His Pleasure ought to be determined in this Court.

If the Lords should commit a great Minister of State, whose Advice is necessary for the King and the Realm, it cannot be imagined that the King shall be without remedy for his Subject, but that he may have him Discharged by his Writ out of this Court.

This present Recess is not ordinary Adjournment; for it is entred in the Journal that the Parliament shall not be Assembled at the Day of Adjournment, but Adjourned or Prorogued to another Day, if the King do not signify his Pleasure by Proclamation.

Some other Exceptions were made to the Return.

1. That no Commitment is returned, but only a Warrant to the Constable to receive him.

2. The Return does not answer the Mandate of the Writ; for that it is to have the Body of *A. E. of S.* and the return of Warrant for the Imprisonment of *A. Ashley E. of S.*

Serjeant Maynard argued to maintain the Return; The House of Lords is the Supream Court of the Realm; 'tis true this Court is superior to all Courts of ordinary Jurisdiction, If this Commitment had been by any Inferior Court, it could not have been maintained; But the Commitment is by a Court that is not under the Controul of this Court; and that Court is in Law sitting at this time, and therefore the expressing the Contempt particularly is a Matter that continues in the Deliberation of that Court: 'Tis true, this Court ought to determine what the Law is in every Case that comes before them, and in this Case the Question is only whether this Court can judge of a Contempt committed in Parliament during the same Session of Parliament, and discharge one committed for such Contempt, when a Question of Privilege ariseth in an Accord depending in this Court, the Court may determine it; but now the Question is, Whether the Lords have capacity to determine their own Privileges, and whether this Court can controul their Determination, and Discharge during their Session a Peer committed for contempt. The

Judge

Judges have often demanded what the Law is, and how a Statute should be expounded of the Lords in Parliament as on the Statute of Amendments, 40 Ed. 3. 34. 6, 8. Co. 157 & 158. a fortiori. The Court ought to demand their Opinion when a Doubt ariseth on an Order made by the House of Lords now sitting.

As to the Determination of the Imprisonment, doubtless the Pleasure of the King is to be determined in the same Court where the Judgment was given.

As to the Determination of the Session the Opinion of Cooke is good Law, and the Addition of Promises of many Acts is only in *Majorem cautelam*.

Attorney Gen. To the same Effect, as to the uncertainty of the Commitment, it is to be considered that this Case differs from all other Cases in two circumstances: 1. The Person which is committed is a Member of the House by which he is committed (I do not take upon me to say that the Case would be different if the person committed were not a Peer. 2. The Court that does commit is Superior to this Court, and therefore if the contempt had been particularly shewn of what Judgment soever this Court should have been as to the contempt, yet they would not have discharged the Earl, and thereby take upon them a Jurisdiction over the House of Peers.

The Judges in no Age have taken upon them the Judgment of what is *Lex & consuetudo Parliamenti*; but here the Attempt is to engage the Judges to give their Opinion in a matter whereof they might have refused to have given it. If it had been demanded in Parliament, 'tis true, if a Writ be brought where Priviledge is pleaded, the Court ought to judge of it as an Incident to the Suit whereof the Court was possess'd; but this will be no warrant for this Court to assume a Judgment of an original Matter arising in Parliament, and that which is said of the Judges power to expound Statutes, cannot be denied.

But it is not applicable to this Case by the same reason that this commitment is questioned, every commitment of the House of Commons may be likewise questioned in this Court. It is objected, that there would be a failure of Justice if the Earl should not be discharged; but the contrary is true; for if he be discharged, there would be a failure of Justice for Offences in Parliament, and therefore the Earl would be discharged from all manner of punishment for his Offence, if he be discharged (for he must be discharged or remanded; for the Court cannot Bail but where they have a Jurisdiction of the Matter) and so delivered out of the Hands of the Lords, who only have power to punish him.

It is objected that the contempt is not said to be committed in the House of Peers, but it may well be intended to be committed there; for it appears he is a Member of that House, and that the contempt was against the House; and besides there are contempts whereof they have Cognisance though they are Committed out of the House, it is Objected that 'tis possible this Contempt was Committed before the General Pardon,

don but surely such Injustice shall not be supposed in the Supream Court, and it may well be supposed to be Committed, during the Session in which the Commitment to Prison was.

It would be great difficulty for the Lords to make their Commitments so exact and particular when they are Employed in the *Arduous* Affairs of the Realm, and it has been adjudged on a return out of *Chantery*, of a Commitment for a Contempt against a Decree that it was good, and yet the Decree was not shown.

The Limitation of the Imprisonment is well, for if the King or the House determine their Pleasure, he shall be discharged; for then it is not the pleasure of both, that he should be detained, and the Addition of those words during the pleasure, is no more then was before Implied by the Law, for if those words had been Omitted, yet the King might have pardoned the Contempt if he had but Exprest his pleasure under the Broad Seal. If a Judgment be given in this Court, that one shall be Imprisoned during the Kings pleasure; his pleasure ought to be Determined by Pardon, and not by any Act of this Court, so that the King would have no prejudice by the Imprisonment of a great Minister, because he could discharge him by a Pardon the double Limitation is for the Benefit of the Prisoner who ought not to complain of the duration of his Imprisonment, since he has neglected to make Application for his Discharge in an orderly way.

I Confess by the Determination of the Session, the orders made the same Session are Discharged, but I shall not affirm whether this present Order will be Discharged or no, because it is a Judgment. But this is not the present Case, for the Session continues notwithstanding the Royal Assent given to several Bills, according to the Opinion of *Cook* and all the Judges. *Hutton*. 61. and 62. Every Proviso in an Act of Parliament is not a Determination of what was the Law before; for they are often added for the Satisfaction of those that are Ignorant of the Law.

Solicitor Gen. To the same effect, in the great Case of *Mr. Selden*, 5 *Car.* 11. the warrant was for notable Contempts committed against us and our Government, and stirring up Sedition; and although that be almost as general as that in our Case, yet no Objection was made to it for that cause in any of the Arguments, *Rushworth's Collections* 18 & 19. in the Appendix. But I agree that this Return could not have been maintained if it were out of an inferiour Court, but during the Session this Court can take no Cognizance of the Matter, and the Inconvenience would be great if the Law were taken otherwise; for this Court might Judge one way, and the House of Peers another: which doubtless would not be for the Advantage and Benefit of the Subject. For the avoiding of this Mischiefe, It was agreed by the whole Court in the Case of *Barnardiston* and *Somes*, that the Accord for the double Return could not be brought in this Court until the *Parliament* had determined the Right of Election, lest there should be a difference between the Judgments of the Courts.

When a Judgment of the Lords comes to this Court, though it be of a Reversal of a Judgment of this Court, the Court is obliged to execute it, but their Judgment was never examined or corrected here. In the Case of the *Lord Hollis*, it was Resolved that this Court had no Jurisdiction of a Misdemeanor committed in *Parliament*, when the *Parliament* is determined, the Judges are the Expositors of the Acts, and are intrusted with the Lives, Liberties and Fortunes of the Subject, and if the Session were Determined, the Earl might apply himself to this Court for the Subject shall not be without a place where he may resort for the Recovery of his Liberty, but this Session is not Determined for the most part the Royal Assent is given the last day, as saith *Plouden*, *Partridges Case*, yet the giving the Royal Assent, does not make it the last day of Parliament without a Subsequent Resolution or Prerogative, and the Court Judicially takes notice of Prorogation and Adjournments of Parliament. *Cro. Jac.* 111. *Ford. Versus Hunten*, and by Consequence no order is discontinued but remains as if the Parliament were actually Assembled. *Cro. Jac.* 342. *Sr. Chr. Handens Case*, so that the Earl ought to apply himself to the Lords who are his proper Judges.

It ought to be observed, That this attempt is *Primæ Impressionis*, and though Imprisonment upon Contempt hath been frequent by the one and the other House, till now no person ever sought Inlargement here: The Court was obliged in Justice to grant the *Habeas Corpus*, but upon the whole matter being disclosed, it appears upon the Return, that the Cause belongs *ad aliud examen*; they ought to remand the Party.

As to the Limitation of the Imprisonment, the King may determine his Pleasure by a Pardon under the Great Seal of *England*, as in the Case of *Reinger* and *Flagossa*, *Plowden* 20.

As to the Exception that no Commitment is returned, the Constable can only shew what concerns himself, which is the Warrant to him directed; and the Writ does not require him to return any thing else.

As to your Exception, that he is otherwise named in the Commitment then in the Writ: The Writ requires to have the Body of *A. Earl of S. Quocunque nomine Censeatur* in the Commitment.

After this, my Lord *Shaftsbury* made a Speech; the Substance thereof followeth.

My Lords,

I Did not intend to have spoke one word in this business, but something hath been Objected and laid to my Charge by the King's Council, Mr. Attorney and Mr. Solicitor, that enforceth me to say something for your better satisfaction. They have told you that my Counsel in their Arguments said, That this Court was greater then the House of Peers, which I dare to appeal to your Lordships and the whole Court, that it was never spoken by them, I am sure was not by any directions of mine. What is done by my Counsel and by me, is, That this is the most proper Court to resort unto where the Liberty of the Subject is concerned. The Lords House is the Supream House of Judicature in the Kingdom; but yet there is a Jurisdiction that the Lords House does not meddle with. The King's Counsel hath mentioned, as a wonder, That a Member of the Lords House should come hither to diminish the Jurisdiction of the Lords. I acknowledge them to be Superiour to this, or any other Court, to whom all Appeals and Writs of Error are brought; and yet there are Jurisdictions that they do not challenge, and which are not natural to them, or proper for them. They claim not to meddle in Original Causes, and so I might mention in other things; and I do not think it a kindness to any Power or Body of men, to give them some power that are not natural or proper to their

Constitution. I do not think it a kindness to the Lords to make them absolute and above the Law, for so I humbly conceive this must do, if it be adjudged that they by a general Warrant, or without any particular Cause assigned, do commit me, or any other man, to a perpetual and indefinite Imprisonment: And, my Lords, I am not so Inconsiderable a person, but what you do in my Case, must be Law for every man in *England*.

Mr. Attorney is pleased to say I am a Member of the Lords House, and to lay weight on the word *Member*. It is very true, I am one of them, and no man hath a greater Reverence or Esteem for the Lords then my self; but, my Lords, I hope my being a Peer, or a Member of either House, shall not loose my being an English man, or make me to have less title to *Magna Charta* and the other Laws of English Liberty;

My Opinion is not with one of my Counsel, who argued very learnedly, That the passing an Act by the King's Royal Assent can make a Sessions, because the usual Promise was not in it. It was without any Instruction of mine to mention that point.

The King's Counsel tells your Lordships of the Laws and Customs of Parliament; and if this was so, I should submit; but this Case of mine is *Primæ Impressionis*, and is a new way, such as neither Mr. Attorney nor Mr. Solicitor can shew any Precedent of, and I have no other remedy nor place to apply to then the way I take.

Mr. Attorney confesseth that the King's pleasure may please me without the Lords. If so, this Court is *Coram Rege*. This Court is the proper place to determine the King's pleasure. This Court will and ought to judge of an Act of Parliament void, if it be against *Magna Charta*, much more may judge an Order of the House, that is put in Execution to deprive any Subject of his Liberty. And if this Order of Commitment be a Judgment, as the King's Counsel affirms, then it is out of the Lords hands, and properly before your Lordships, as much as the Acts which were lately passed, which I presume you will not refuse to judge of, notwithstanding that the King's Attorney General saith that this Parliament is itill in being: I take it something ill that Mr. Attorney tells me I might have applied elsewhere.

My Lord, I have not omitted what became my Duty towards the King; for besides the Oath of Allegiance I took as a Peer, or an English man, there is something in my Breast that will never suffer me to depart from the Duty and Respect that I owe him; but I am here before him, he is always supposed to be here present, and he alloweth his Subjects the Law.

My Lord, they speak much of the Custom of Parliament; but I do affirm to you, there is no Custom of Parliament that ever
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their Members were put out of their own Power; and the Inconveniences of it will be endless.

Mr. Attorney was pleased easily to answer the Objection of one of my Counsel; If a great Minister should be so Committed, he hath the Cure of a Pardon, a Prorogation, or a Dissolution: but if the Case should be put, why forty Members, or a greater number, may not as well be taken away without remedy in any of the King's Courts, he will not so easily answer; and if in this Case there can be no relief, no man can foresee what will be hereafter.

I desire your Lordship well to consider what rule you make in my Case, for it will be a Precedent that in future Ages may concern every man in *England*.

My Lord, Mr. Attorney saith you can either release or remand me; I differ from him in that Opinion. I do not insist upon a Release: I have been a Prisoner above five Months already, and come hither of Necessity, having no other way to get my Liberty, and therefore am very willing to tender your Lordship Bayl, which are in or near the Court, good as any are in *England*, either for their Quality or Estate, and I am ready to give any Sum or Number.

My Lord, this Court being possess'd of this business, I am now your Prisoner.

The Court delivered their Opinion *Seriatim*.

Justice Jones. Such a Return made by an Ordinary Court of Justice, would have been ill and uncertain; but the Cause is different when it comes before this High Court, to which so much respect has been paid by our Predecessors, that they have deferred the Determination of Doubts conceived on an Act of Parliament, until they have received the Advice of the Lords: and now, instead thereof, it is demanded of us to controll the Judgment of all the Peers, and given on a Member of their own House, and during the continuance of the same Session. The Cases where the Courts of *Westminster* have taken Cognizance of Privilege, differ from this Case: for in those it was only an Incident to the Case before them; which was of their Cognizance; but the direct point of the Matter is now the Judgment of the Lords.

The course of all Courts ought to be considered, for that is the Law of the Court, *Lane's Case 2. Rest.* and it has not been affirmed, That the Usage of the House of Lords has used to express the matter more particularly on Commitments for Contempts, and therefore I shall take it to be according to the course of Parliament. 4. *Inst.* 50. It is said that the Judges are Assistants to the Lords, to Inform them of Common Law; but they ought not to Judge of any Law, Custom, or Usage of Parliament. The

The Objection as to the continuance of the Imprisonment, has received a plain Answer, for it shall be determined by the Pleasure of the King, or of the Lords: and if it were otherwise, yet the King could pardon the Contempt under the Great Seal, or discharge the Imprisonment under the Privy Seal.

I shall not say what would be the consequence (as to this Imprisonment) if the Session were determined, for that is not the present Case; but as the case is, the Court can neither Bayl nor Discharge the Earl.

Chief Justice. The Return no doubt is illegal; but the question is of a Point of Jurisdiction, Whether it may be examined here? This Court can't meddle with the Transactions of the most High Court of Peers in Parliament, during the Session, which is not determined; and therefore the certainty or uncertainty of the Return is not material, for it is not examinable here: but if the Session had been determined, my Opinion would be, that he ought to be discharged.

Hainford Chief Justice. This Court has no Jurisdiction of the Cause, and therefore the Form of the Return is not considerable. We ought not to extend our Jurisdiction beyond its due limits, and the actions of our Ancestors will not warrant us in such an Attempt.

The Consequence would be very mischievous if this Court should deliver a Member of the House of Peers and Commons who are committed, for thereby the business of Parliament may be retarded: for it may be the Commitment was for evil behaviour, or undecent reflections on other Members, to the disturbance of the Affairs of Parliament.

The Commitment in this case is not for safe Custody, but he is in execution of the Judgment given by the Lords for the Contempt, and therefore if he should be bayled, he would be delivered out of execution; for a Contempt *in facie Curie* there is no other Judgment or Execution.

This Court has no Jurisdiction, and therefore he ought to be remanded. I deliver no Opinion whether it would be otherwise in case of a Prorogation.

Twisden Justice was absent, but he desired Justice Jones to declare that his Opinion was, That the Party ought to be Remanded.

And so he was remanded by the Court.

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October 23. 1679.

I Do Appoint *Robert Pawlet* to Print this my
Speech: And that no other Person presume to Re-
Print the same.

WILLIAM SCROGGS.